

Determination of native title – Ngarla People

***Brown v Western Australia* [2007] FCA 1025**

Bennett J, 30 May 2007

Issue

The issue in this case was whether the Federal Court should make a determination under the *Native Title Act* 1993 (Cwlth) (NTA) recognising the existence of native title over certain areas subject to several claimant applications made on behalf of the Ngarla.

Background

The parties agreed to a determination being made recognising the existence of the Ngarla's native title. The Strelley Pastoral Pty Ltd (which included Aboriginal people who have a claimant application on foot that overlaps part of the Ngarla application) consented to the making of the determination on the basis that the order made, and any findings of fact or conclusions of law implicit in it, are confined to the determination area as defined in this case, i.e. determination area A.

Power of the court – ss. 87 or 87A?

A question arose as to the applicable provision of the NTA. Amendments to the NTA made on 15 April 2007 inserted s. 87A, which applies where a consent determination is sought over only part of the area covered by a native title determination application. The court can now rely on s. 87 only if satisfied that the determination is not one that could be made under s. 87A. It was found that:

- the exercise of the discretion available s. 87A imports the same principles as those applying to the making of a consent determination of native title under s. 87;
- the discretion conferred by ss. 87A and 87 must be exercised judicially and within the broad boundaries ascertained by reference to the subject matter, scope and purpose of the NTA;
- the NTA is designed to encourage parties to take responsibility for the resolution of the proceedings, without the need for litigation and the court's power must be exercised flexibly and with this purpose in mind—at [22] to [23].

The court was, therefore, satisfied both that:

- a determination of native title in the terms set out by the parties was within the power of the court;
- it was appropriate to do so, pursuant to s. 94A and either ss. 87A or 87(1)(a)(ii) and 87(1)(b) —at [25] to [29].

Determination

Native title was recognised in relation to that part of determination area A landward of the lowest astronomical tide (LAT) of the mainland coast. Native title was not recognised in relation to any area seaward of the LAT—at [3].

Trustee prescribed body corporate determined

The Ngarla people were determined to be the common law holders of native title. Their native title rights and interests are held in trust by the Wanparta Aboriginal Corporation, a prescribed body corporate for the purposes of s. 56—at [4].

Rights and interests recognised

The nature and extent of the native title rights and interests recognised are non-exclusive rights to:

- access and camp;
- take flora, fauna, fish, water and other traditional resources (excluding minerals);
- engage in ritual and ceremony;
- care for, maintain and protect from physical harm, particular sites and areas of significance to the common law holders— at [5(1)].

Sections 47A and 47B apply in relation to certain areas—at [7].

Qualifications

The native title rights and interests do not confer:

- possession, occupation, use and enjoyment on the common law holders to the exclusion of all others;
- a right to control the access of others.

They are exercisable in accordance with the traditional laws and customs of the common law holders for personal, domestic and non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes) and are subject to, and exercisable in accordance with, the laws of the state and the Commonwealth, including the common law—at [8].

Rights to minerals and petroleum as defined in state legislation are not included but the right to take and use ochre, to the extent that ochre is not a mineral pursuant to the *Mining Act 1904* (WA), was recognised—at [6].

Relationship between native title and other rights and interests

The relationship between the native title rights and interests and the other rights and interests is that:

- to the extent that any of the other rights and interests is inconsistent with the native title rights and interests, the native title rights and interests continue to exist but have no effect in relation to the other rights and interests to the extent of the inconsistency during the currency of the other rights and interests; and otherwise,
- the existence and exercise of the native title rights and interests does not prevent the doing of any activity required or permitted to be done by, or under, the other rights and interests and the other rights and interests, and the doing of any activity required or permitted to be done by or under the other rights and interests, prevail over the native title rights and interests and any exercise of the native title rights and interests, but do not extinguish them — at [10].